89-1898

Supreme Court, U.S.
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No. 89-

SUPREME COURT OF THE UNITED STATES

October Term, 1989

STEVEN HOWARD OKEN,

Petitioner,

v.

STATE OF MAINE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT, KNOX COUNTY, MAINE

PETITION FOR A WRIT OF CERTIORARI

Benjamin Lipsitz,
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for Petitioner,
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QUESTIONS PRESENTED

1. Whether the Interstate Agreement on Detainers or the Unifrom Criminal Extradition Act controlled Oken's transfer from Maine to Maryland.

2. Whether the teletype referring to Oken /1, which the Maine State Police received from the Baltimore County, Maryland, Police Department on November 18, 1989, was a detainer activating the Interstate Agreement on Detainers, so that Baltimore County's subsequent extradition of Oken in the instant proceeding (begun

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/1 The teletype read, in pertinent part:

> "Please use this TTY as a detainer on the above subject. This dept. holds Warrant #642567C2 charging him with first degree murder and also Warrant #642587C1 charging him with first degree murder. Our department will extradite authority: Assistant States Attorney for Baltimore County, Maryland: Ann Bropst."

on October 16, 1989, while he was serving a sentence of life imprisonment in Maine for a murder to which he had pleaded gulity there) based on an Executive Agreement between the governors of Maine and Maryland entered into under the Uniform Criminal Extradition Act deprived Oken of due process of law, in violation of the Fourteenth Amendment, by denying him the benefit of applicable provisions of the Interstate Agreement on Detainers.

3. Whether delivery of Oken by Maine to Maryland under the Executive Agreement signed by the governors of those states late in 1989 and providing that if he should be sentenced to death or life without parole in Maryland he would not be returned to Maine to complete his life sentence there deprived Oken of due process of law, in violation of the Fourteenth Amendment, by denying him the

benefit of applicable provisions of the Interstate Agreement on Detainers.

4. Whether lodging of the teletype detainer while Oken was awaiting trial in Maine activated the Interstate Agreement on Detainers with respect to him and preempted his being tranferred to Maryland under the Uniform Extradition Act by means of the Executive Agreement between the governors of Maine and Maryland entered into after he began serving a sentence of life imprisonment in Maine,

LIST OF PARTIES

The State of Maine and Steven Howard Oken were the only parties to this case in the Superior Court, Knox County, Maine (as well as in all other courts involved below).

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT, KNOX COUNTY, MAINE

PETITION FOR A WRIT OF CERTICRARI

Steven Howard Oken, petitioner, prays that a writ of certiorari issue to review the judgment of the Superior Court, Knox County, Maine, in a cause entitled State of Maine v. Steven Howard Oken, Criminal Action, Docket No. CR-89-502, denying Oken's petition for a writ of habeas corpus in an extradition proceeding in

which Oken resisted extradition from Maine, where he was serving a sentence of life imprisonment for murder and other offenses committed in that state (to which he had interposed guilty pleas under North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.E.2d 162 [1970]), to Maryland for trial on indictments pending there charging him with offenses, including two first degree murders and other offenses in that state. (In resisting extradition, Oken contended, in part, that his delivery to Maryland deprived him of due process of law, in violation of the Fourteenth Amendment, because a detainer filed by Baltimore County, Maryland authorities with the Maine State Police on November 18, 1987, the day following his arrest for the Maine offenses, invoked the provisions of the Interstate Agreement on Detainers and required that any future delivery of

him to Maryland for trial be obtained pursuant to and in accordance with that compact [under which, should he be convicted and sentenced in Maryland, he would have to be returned to Maine for completion of his sentence there before any Maryland sentence was carried out], and not by way of extradition, and because the Executive Agreement between the governors of Maine and Maryland, under which his extradition was effected in the instant proceeding, provided that he was not to be returned to Maine if convicted in Maryland and sentenced to death or life without parole.)

OPINIONS BELOW

The opinion of the Superior Court, Knox County, Maine, dated January 30, 1990 and filed on February 1, 1990, is not reported. A copy is appended hereto. Infra, App. 1.

A "Response to Motion for Findings of Fact and Conclusions of Law", filed by the Superior Court, Knox County, Maine on February 6, 1990, is not reported. A copy is appended hereto. Infra, App. 14.

An "Order Denying Certificate of Probable Cause", filed on March 6, 1990 by the Supreme Judicial Court, State of Maine, Sitting as the Law Court (Docket No. Kno-90-70), denying Oken a certificate of probable cause to proceed with his appeal from the judgment entered by the Superior Court, Knox County, in the extradition proceedings, is not reported. A copy is appended hereto. Infra, App. 17.

JURISDICTION

The judgment of the Superior Court, Knox County, Maine (the judgment sought to be reviewed), dated January 30, 1990, was entered on February 1, 1990. The order of

the Supreme Judicial Court, State of Maine, Sitting as the Law Court, denying Oken's request (implicit as a matter of law in his notice of appeal from the judgment of the Superior Court in the instant extradition proceeding) for a certificate of probable cause to proceed with that (discretionary) appeal, was made and filed on March 6, 1990. Thereupon the judgment of the Superior Court became and was the final judgment of the highest court of the State of Maine in which a decision could be had in the extradition proceeding. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(a), and Rules 12.1 and 13.1 of the Rules of this Court effective January 1, 1990.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 10, clause 3, of the Constitution of the United States

provides, in part pertinent hereto:

> "[N]o State shall, without the Consent of Congress, ... enter into any Agreement or Compact with any other State . . . ."

(U.S.C. Const. Art. I, Sec. 1Ø, cl. 3).

Article IV, Section 2, clause 2, of the Constitution of the United States provides, in part pertinent hereto:

> "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

(U.S.C. Const. Art. IV, Sec. 2, cl. 2).

Amendment XIV to the Constitution of the United States provides, in part pertinent hereto:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

(U.S.C. Const. Amend. XIV).

The Maryland version of the Unifrom Extradition Act provides in part:

> "When it is desired to have returned to this State a person charged in this State with a crime, and such person is imprisoned or held under criminal proceedings then pending against him in another state, the Governor of this State may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this State as soon as the prosecution in this State is terminated."

(Md. Code Annot., Art. 41, Sec. 2-205).

STATEMENT OF THE CASE

Oken was arrested on November 17, 1987 in Freeport, Maine on a warrant charging him with the murder of Lori Elizabeth Ward in Kittery, Maine on November 16, 1987. On November 18, 1987 the Maine State Police received a teletype from Baltimore County, Maryland, police reading, in pertinent part, as follows:

"REF: STEVEN HOWARD OKEN W/M DOB/012962

"PLEASE USE THIS TTY AS A DETAINER ON THE ABOVE SUBJECT. THIS DEPT. HOLDS WARRANT #642567C2 CHARGING HIM WITH FIRST DEGREE MURDER AND ALSO WARRANT #642567C1 CHARGING HIM WITH FIRST DEGREE MURDER. OUR DEPARTMENT WILL EXTRADITE AUTHORITY: ASSISTANT STATES ATTORNEY FOR BALTIMORE COUNTY, MARYLAND: ANN BROBST."

On April 21, 1989 Oken entered an Alford plea (see supra at 2) of guilty to the murder of Miss Ward (and two related charges). State of Maine v.Steven Howard Oken, Superior Court, York County, Criminal Action, Docket No. 87-1433. On June 23, 1989 he was sentenced in that case to imprisonment for life. /2

On October 16, 1989 the instant extradition proceeding was begun by a

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/2 Maine has no death penalty for murder. 17-A M.R.S.A., Sec. 1251. Maryland (for first degree murder) does. Md. Code Annot., Art. 27, Sec. 412(b).

criminal complaint filed against Oken charging him with being on that date "a fugitive from justice of the State of Maryland, having been charged with the crimes of Murder on May 30, 1989 in Baltimore County, Maryland and who was present in the State of Maryland at the time of the commission of the Murders and thereafter left the State of Maryland and is present in the State of Maine." State of Maine v. Steven Howard Oken, District Court, District Six, Knox Division, Docket No. 89-3857. Oken resisted extradition, contending, inter alia, that the teletype received by Maine State Police on November 18, 1987 was a detainer within the contemplation of the Interstate Agreement on Detainers (see 34-A M.R.S.A., Sec. 9601 et seq., for the Maine version thereof and Md. Code Annot., Art. 27, Sec. 616A et seq., for the Maryland counterpart), that

the interstate compact, and not any extradition statute (see 15 M.R.S.A., Sec. 201 et seq., for the Maine Extradition Act and Md. Code Annot., Art. 41, Sec. 2-201 et seq., esp. Sec. 2-205, for the Maryland equivalent), hence governed his transfer to Maryland and would require his return to Maine for completion of his life sentence there before he could commence any sentence imposed upon him in Maryland, should he be convicted there. He contended further that a provision of the Executive Agreement between the governors of Maine and Maryland, under which his extradition was being sought, requiring that if he were convicted in Maryland and received a sentence of death or life without parole, he would not be returned to Maine, exceeded the scope of any authority afforded by the extradition statutes. He argued that both permitting

his removal to Maryland by way of extradition, rather than under the Interstate Agreement on Detainers, and the provision of the Executive Agreement prohibiting his return to Maine in the event he received a sentence of death or life without parole upon a conviction in Maryland deprived him of due process of law, in violation of the Fourteenth Amendment.

Those federal constitutional questions were raised in the courts below. In his "Memorandum on Petitioner's Appeal", filed in the Maine Supreme Judicial Court, Sitting as the Law Court, Oken presented, inter alia, the following issue:

"ISSUES ON APPEAL:

* * * * *

"III. Whether the Executive Agreement between the governors of Maine and Maryland violates the

> Petitioner's rights under the Due Process Clause of the United States Constitution?"

(Id. at 2-3).

In that paper he amplified the "[s]ubstantive [b]asis" (Id. at 3) of that issue, as follows:

> "ISSUE III
>
> "The Maryland court, under the terms of the Executive Agreement, looses [sic] custody and control of the prisoner's punishment unless a sentence is imposed which is death or life without parole. The harshness of the Petitioner's sentence will be, in part, the product of extrinsic factors created by the Executive Agreement. The Executive Agreement violates the prisoner's due process rights and the right to fundamental fairness because it effectively prejudices him in any sentencing proceeding following a conviction in Maryland. Anything less than a life sentence will send the petitioner back to Maine. The pre-arrangement contained in the agreement is repugnant to the Criminal Extradition Act and a violation of the prisoner's constitutional due process and right of fundamental fairness."

(Id. at 8; underlining in original.)

In connection with another issue presented in that paper, as to "[w]hether the Governor of the State of Maine, in signing the Executive Agreement, acted in a manner contrary to prior stated intentions of a representative of the State, which indicated Maine would not seek to prevent the Petitioner from serving his complete sentence in Maine" [Id. at 3; Issue IV], he argued, in part:

> "At the very least, Maine has agreed, in consideration of the guilty pleas tendered, to allow the Petitioner the benefits which naturally would flow from his tactical decision to enter a plea. The Executive Agreement, in contrast, deliberately seeks to arrange for the most detrimental possibility (death) to occur to the Petitioner. It is fundamentally unfair and a violation of the Petitioner's constitutional rights to allow the Governor of Maine to participate in an agreement which plunders the intentions of a prior understanding made in connection with the Petitioner's guilty plea."

(Id. at 10). /3 (See page 14 hereof for n. 3.)

In his "Memorandum of Law on Petition Contesting Extradition", filed in the Superior Court, Knox County, Oken, arguing that Maine and Maryland had a duty to comply with the Interstate Agreement on Detainers and that the Executive Agreement between their respective governors contravened that compact, said in part:

/3 The State of Maine rejected that basis. In its "Memorandum of Law in Support of Governor's Agreement Concerning Steven Howard Oken", filed in the Superior Court, Knox County, it contended that "[t]he State of Maine, neither implicitly nor explicitly agreed to permit, as part of the plea agreement, that petitioner would complete his Maine sentence prior to his Maryland sentence" (Id. at 14), stating in part:

> "Petitioner seems to be suggesting that the executive agreement is inconsistent with or contradictory to the plea agreement entered into between the State of Maine and the petitioner. This is simply not so. . . . ."

(Id. at 14).

> "In addition, the Executive Agreement violates the prisoner's due process rights and the right to fundamental fairness because it effectively prejudices him in any sentencing proceeding following a conviction in Maryland. The Maryland court, given the terms of the Executive Agreement, looses [sic] custody and control of the prisoner's punishment unless a sentence is imposed which is death or life without parole. The harshness of Petitioner's sentence will be, in part, the product of extrinsic factors created by the Executive Agreement. The prearrangement contained in the agreement is repugnant to the Criminal Extradition Act and a violation of the prisoner's constitutional due process and right of fundamental fairness."

(Id. at 7; underlining in original).

Oken believes the federal questions sought to be reviewed thus were timely and properly raised below, both in the court of first instance (the Superior Court, Knox County) and in the appellate court (the Maine Supreme Judicial Court, Sitting as the Law Court), so as to give this Court jurisdiction to review the judgment

below on a writ of certiorari. /4

/4 Moreover, Oken suggests, since authority for extradition arises solely and entirely from Article IV, Section 2, clause 2, of the Constitution of the United States and law enacted by Congress in pursuance thereof, see, e.g., Ortega v. City of Kansas City, Kan., 875 F.2d 1497 (10th Cir. 1989); Ex Parte Morgan, 20 F. 298 (D.C.Ark. 1883); Brown v. Sharkey, 106 R.I. 714, 263 A.2d 104 (1970), i.e. is a matter of and is controlled by a federal constitutional provision and by applicable federal law, issues as to right to extradite and as to procedural and substantive validity of a particular extradition proceeding, such as are presented here, are per se federal questions reviewable by this Court. Similarly, the Interstate Agreeement on Detainers, a congressionally sanctioned interstate compact within the compact clause (Article I, Section 10, clause 3, of the Constitution of the United States), is a federal law subject to federal construction, U.S.C. Const., Art. I, Sec. 10, cl. 3; Carchman v. Nash, 473 U.S. 716, 105 S.Ct. 3401, 87 L.Ed.2d 516 (1985), and issues arising thereunder are hence also federal questions reviewable by this Court. Therefore, Oken submits, all issues arising from the extradition proceeding which is the subject of this petition for certiorari properly are or should be available for review by this Court, even absent any special delineation of specific federal questions below.

REASONS FOR ALLOWING THE WRIT

The Superior Court, Knox County, Maine (which became and was the highest court of that State in which a decision could be had in this case when the Maine Supreme Judicial Court, Sitting as the Law Court, declined to issue the certificate of probable cause required to allow Oken to proceed with his appeal from the Superior Court) decided important and pervasive federal questions pertaining to interpretation, construction, application, scope and effect of provisions of the Uniform Criminal Extradition Act and the Interstate Agreement on Detainers (each as embodied in respective statutes of Maine and Maryland) and pertaining to tensions between those two federally founded enactments arising from the circumstances of the instant case. Because both the Extradition Act and the Agreement on

Detainers enjoy widespread acceptance by the States, the issues involved and their appropriate resolution plainly affect matters of national concern.

Thus, the Maine court refused to recognize as a detainer invoking operation of the Interstate Detainer Act a communication from police authorities in Maryland to Maine State Police patently purporting on its face to be a detainer. /5 The Maine court held that the communication in question could not be a detainer and could not trigger operation of the Interstate Agreement on Detainers because it was lodged on November 18, 1987, one day after Oken's apprehension in Maine for offenses occurring there, rather

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/5 The pertinent language of the communication was (referring to Oken): "Please use this TTY as a detainer on the above subject."

than after he had been sentenced and begun serving his term of imprisonment. The Maine court reached that conclusion despite that the detainer was never withdrawn, but remained in full force and effect throughout Oken's incarceration in Maine, including on April 21, 1989, when he pleaded guilty to the Maine murder, on June 23, 1989, when he was sentenced to life imprisonment for that offense (and to concurrent lesser terms for related offenses), and on October 19, 1989, when the instant extradition proceeding began. Thus the detainer was in effect at least from November 18, 1987, when it was lodged, until Oken finally was removed from Maine by Maryland authorities in March, 1990, as a result of the ruling of the Superior Court, Knox County, sought to be reviewed.

A detainer, once lodged, remains in force until withdrawn or satisfied. As was said by this Court in Carchman v.Nash, 473 U.S. 716, 719, 105 S.Ct. 3401, 3403, 87 L.Ed.2d 516 (1985): "A detainer is a request filed by a criminal justice agency with the institution in which a prisoner is incarcertaed, asking the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent." See also Cuyler v. Adams, 449 U.S. 433, 436, n. 3, 101 S.Ct. 703, 706, n. 3, 66 L.Ed.2d 641 (1981); United States v. Mauro, 436 U.S. 340, 359, 98 S.Ct. 1834, 1846, 56 L.Ed.2d 329 (1978). When the instant detainer was lodged, Oken was incarcerated in the York County Jail, Alfred, Maine, awaiting trial in York County Superior Court for the murder of Lori Elizabeth Ward. As this Court noted in Mauro, supra, 436 U.S. at

358, 98 S.Ct. at 1846, ". . . . a detainer may be lodged against a prisoner on the initiative of a prosecutor or law enforcement officer." The November 18, 1987 teletype seems to possess all the necessary indicia of a detainer. It specifies that it is intended as a detainer. It was filed with an institution, the York County Jail /6, where Oken then was incarcerated. It asked that Oken be held for the agency which filed it. It was lodged on the initiative of a law enforcement agency. It clearly sought Oken's detention for ultimate delivery to Maryland authorities. /7 (See page 22 hereof for n. 7.)

/6 The Maryland version of the Interstate Agreement on Detainers defines "correctional institution", with reference to such institutions in that state, as including "the jail of any county or the City of Baltimore." Md. Code Annot., Art. 41, Sec. 616K(b).

The circumstance that the teletype was filed before Oken was sentenced (a ground relied upon by the Knox County Superior Court in holding that it was not a detainer) does not destroy its efficacy in that respect. In Mauro, supra, this Court noted and discussed the circumstance that in recommending adoption of the Interstate Agreement on Detainers the Council of State Governments, in part, "pointed out that the existence of detainers presented problems in sentencing". (436 U.S. at 360, 98 S.Ct. at 1847). The discussion in that regard in Mauro (436 U.S. at 359-360, 98 S.Ct. at 1846-1847) affords an indication that mere filing prior to sentencing does not render

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/7 A copy of the November 18, 1987 teletype was first exhibited to Oken's counsel by personnel at the York County Jail, who apparently received it from Maine State Police authorities to whom it was addressed.

ineffective a notification otherwise sufficient as a detainer. The Court of Appeals of Maryland has held, in a case where after conviction of defendant in Pennsylvania for murder, but before imposition of the death sentence, detainers were lodged against him by Maryland authorities with the Pennsylvania Bureau of Corrections, filing of the detainers activated provisions of the Interstate Agreement on Detainers, so that defendant was entitled to dismissal of pending Maryland indictments for kidnapping and larceny because he was not brought to trial on those indictments within the time required by the Agreement. Hoss v. State, 206 Md. 136, 292 A.2d 48 (1972). /8

/8 In so holding, the Maryland court remarked, in part (292 A.2d at 54):

The fact that Oken received a life sentence in Maine was also a premise for the Knox County Superior Court's conclusion that filing of the teletype detainer did not activate the Interstate Agreement on Detainers and hence that Oken's transfer to Maryland validly could be effected under the Extradition Act and without regard to requirements applicable to custody obtained pursuant to detainers. The court reasoned that the concern of the Interstate Agreement on Detainers was with

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/8 (Cont'd.) -

> "We draw some comfort from an awareness that our decision today is not likely to expedite Hoss's release from the bastilles of Pennsylvania. Indeed if the identifiable remains of the kidnapped mother and child are ever discovered a further indictment is possible. But even if Hoss were to be set free tomorrow we could not do otherwise. The indictments must be dismissed with prejudice."

rehabilitation. It apparently considered that rehabilitation could not occur in the context of a life sentence. That, Oken submits, is an inherently erroneous approach. Rehabilitation is not the exclusive province of individuals who are ultimately to be released. Nor is it necessarily restricted to restoring or reforming only such persons. A prisoner who is to remain in custody nevertheless can be rehabilitated as a person. Are our (supposedly enlightened) correctional institutions to disregard inmates serving life sentences (other than to warehouse them)? Are such prisoners simply to vegetate? Are they not equally entitled to participate in prison programs, including training and educational opportunities (i.e. rehabilitative activities)? If they are (and fundamental fairness would seem to require that they

should be), then this Court's comment in Mauro, supra, that "[b]ecause a detainer remains lodged against a prisoner without any action being taken on it, he is denied certain privileges within the prison, and rehabilitation efforts may be frustrated" (436 U.S. at 360, 98 S.Ct. at 1847), applies as much to a prisoner for life, like Oken, as to any other inmate. Such a person certainly should be equally entitled to opportunities to rehabilitate himself, to make himself into a different and better being, if he can, even in the context of a lifetime in prison. The Maine court's conclusion that imposition of a life sentence per se excludes rehabilitation and obviates activation of the Interstate Agreement on Detainers violates fundamental concepts of fair play (due process and equal protection) embodied in the Fourteenth Amendment. It

should be reviewed (and rejected) by this Court.

The Executive Agreement between the governors of Maine and Maryland, under which Oken's transfer to Maryland was accomplished, premised upon the Extradition Act (ostensibly as implemented by pertinent statutes of the two states), disregards entirely the Interstate Agreement on Detainers, which Oken contends applied to and controlled his removal to Maryland in the circumstances of this case from the moment the detainer incorporated in the November 18, 1987 teletype was lodged. Invocation and activation of the Interstate Agreement, which occurred when that detainer was filed, had a decidedly preemptive effect, requiring any future delivery of Oken to Maryland authorities to be accomplished in accordance with its provisions. His

removal to Maryland by means of an extradition proceeding no longer was available. Mauro, supra, is ample authority for the proposition that the Interstate Agreement on Detainers is activated by the filing of a detainer and, once it attaches, controls interstate transfer of the prisoner involved. 473 U.S. at 718-721, 105 S.Ct. at 3402-3404. Filing of the detainer invoked the Interstate Agreement and rendered the subsequent Executive Agreement, executed under the Extradition Act, ineffective.

Moreover, the agreement exceeded at least the Maryland governor's authority. It requires Oken to remain in Maryland if his sentence there is death or life without parole. But the Maryland extradition statute authorized its governor to enter into the agreement pertaining to Oken only on condition that

he be returned to Maine upon termination of his prosecution in Maryland. The pertinent statutory provision is set out in the Maryland version of the Unifrom Extradition Act. It reads, in pertinent part, as follows (Md. Code Annot., Art. 41, Sec. 2-205):

> "[Sec.] 2-205. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion.
>
> "When it is desired to have returned to this State a person charged in this State with a crime, and such person is imprisoned or held under criminal proceedings then pending against him in another state, the Governor of this State may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this State as soon as the prosecution in this State is terminated."

(Maine has a similar provision. See 15 M.R.S.A., Sec. 205.) The Executive

Agreement thus patently ignores and plainly contravenes the controlling statutory condition (supra), "that such person [Oken] be returned to such other state [Maine] at the expense of this State [Maryland] as soon as the prosecution in this State [Maryland] is terminated." The Executive Agreement hence violates a command of the Maryland version of the Extradition Act, the provisions of which are premised upon Article IV, Section 2, clause 2, of the Constitution of the United States, and hence is fatally (and constitutionally) defective in that regard.

The Executive Agreement's provision that Oken is not to be returned to Maine if Maryland imposes a sentence of death or life without parole (i.e. a sentence [death] greater than, or one [life without parole] equal to, Maine's) not only

exceeds the authority afforded under (at least) the Maryland extradition statute, but injects into any sentencing process to which Oken may be subjected in Maryland an extremely unfair and highly prejudicial element. Human nature being what it is, the Executive Agreement offers Maryland a powerful inducement and an attractive incentive if it wishes to retain control of Oken and dictate his ultimate sanction, i.e. simply to punish him more severely than Maine did or, more specifically, to kill him. (Both Maine and Maryland likely would favor such a solution, since the cost of housing, feeding and caring for a young person like Oken [who is now 28 years old] for the remainder of his natural life then conveniently would be avoided.) The presence in the Executive Agreement of the provision pertaining to sentencing deprives Oken, in any

sentencing proceeding in Maryland, of that due process of law and equal protection of the laws constitutionally assured to even the least or worst of us by the Fourteenth Amendment, because the agreement clearly offers and encourages utilization of a very seductive alternative, i.e. simply getting rid of Oken altogether by executing him while at the same time realizing substantial savings which will result from thereby avoiding the not inconsiderable cost of his care and maintenance over a potentially quite protracted period of time. It also offends those constitutional entitlements in at least one other most critical way. The very existence of the agreement's provision pertaining to sentencing inescapably will affect, color, impede and prevent free and unfettered exercise of Oken's right to choose his sentencer,

should he be convicted in a Maryland court of first degree murder. In Maryland, a defendant receives a separate sentencing trial in a death penalty case. Md. Code Annot., Art. 27, Sec. 413 (a), (b). (The State's Attorney for Baltimore County is seeking the death penalty in each of Oken's murder cases.) Choice of sentencer (judge or jury) in the sentencing trial is given to the defendant. Id., Sec. 413(b)(3). A Maryland judge sitting in Oken's cases, having easy access to the contents of the Maryland court's files, certainly will be or become aware of the Executive Agreement and its provision pertaining to sentencing, which now controls whether Oken will remain in Maryland or return to Maine. Through media and other publicity incident to Oken's situation, including with respect to his conviction in Maine, his return to

Maryland and his impending prosecutions there, jurors also may be or become aware of the Executive Agreement and be persuaded or encouraged by its provision pertaining to sentencing to look with favor upon imposition of the death penalty, as representing a ready resolution of the problems presented. In any event, because of the content of the Executive Agreement, Oken hardly will be able, if convicted in Maryland, to make a choice of sentencer free from extrinsic considerations obviously detrimental to him improperly and introduced solely by reason of the provision regarding sentencing contained in the Executive Agreement. Whatever he may or may not have done, Oken, like any other criminal defendant in this country, is at least entitled to all options afforded others in a similar position. Under Maryland

procedure in a death penalty case procedure that includes a fair and meaningful opportunity to select his sentencer, in the event of conviction, i.e. an unencumbered chance to choose who shall decide if he lives or dies. Such a choice certainly cannot validly be impeded by requiring him to submit to a sentencer preconditioned by knowledge of the terms of the Executive Agreement, or to choose between two prospective sentencing tribunals, each of which may be infected with knowledge of the Executive Agreement. Nor is a proper choice afforded him if one of the considerations he must weigh in selecting his sentencer is whether a judge or a jury more likely has knowledge of and will be affected by the terms of that agreement. Yet that is just what Oken faces. Existence of the Exexecutive Agreement effectively denies

him an unfettered opportunity to make the necessary choice of sentencer. Its provision pertaining to sentencing in effect denies him a level playing field in the Maryland prosecutions in what likely will be the most important phases thereof, the disposition proceedings. The Executive Agreement hence operates to deny him due process and to deprive him of equal protection, in violation of the Fourteenth Amendment. The Maine court's decision upholding that agreement should be reviewed (and rejected). The important questions presented, controlled by federal constitutional provisions and law, warrant and deserve the attention of this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Benjamin Lipsitz,
Counsel of Record
for Petitioner

Baltimore, Maryland

June 4, 1990

APPENDIX

STATE OF MAINE
KNOX, ss.

SUPERIOR COURT
Criminal Action
Docket No. CR-89-502

STATE OF MAINE,
Plaintiff

v.

STEVEN HOWARD OKEN,
Defendant

DECISION AND ORDER

INTRODUCTION

Stephen [sic] Howard Oken was arrested on a warrant charging him with the November 16, 1987 murder of Lori Elizabeth Ward in Kittery. On November 18, 1987 the Maine State Police received a teletype from the Maryland State Police [sic] advising that they had warrants charging Oken with two first degree murders. It requested that the teletype be used as a detainer on Oken. It further stated that its department would extradite

him. On April 21, 1989 Oken entered a guilty plea to the murder of Lori Ward and on June 23, 1989 he was sentenced to imprisonment for life.

On October 16, 1989, a criminal complaint was filed in the Sixth District, Knox Division, charging Oken with being a fugitive from justice under 15 M.R.S.A. [sec.] 201. /1

/1 15 M.R.S.A. [sec.] 201 (4) (A) provides:

4. Fugitive from justice. "Fugitive from justice" means:

A. Any person accused of a crime in the demanding state who is not in that state, unless he is lawfully absent pursuant to the terms of his bail or other release. This definition shall include both a person who was present in the demanding state at the time of the commission of the alleged crime and thereafter left the demanding state and a person who committed an act in this State or in a 3rd state or elsewhere resulting in or constituting a crime in the demanding state;

Oken is contesting extradition under M.R.S.A. [sec.] 201. It is his position that a detainer issued from the State of Maryland when the teletype was received from that State on November 18, 1987. /2 He therefore contends that the Interstate Compact on Detainers (ICD), 34-A M.R.S.A. [sec.] 9601 et seq., and its Maryland counterpart, Maryland Code Article 27 [sec.] 616A et seq., govern the transfer of Oken to Maryland for trial. He further contends that his transfer to Maryland for trial (which has the death penalty for murder) under the ICD would require his return to Maine to complete his life sentence before he could commence any sentence for conviction of crimes in Maryland, whereas the transfer under the

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/2 The State does not concede that the teletype constituted a detainer.

extradition statute, 15 M.R.S.A. [sec.] 201 et seq., would not require his return to Maine.

Included with the documents filed in the District Court is an Executive Agreement (Oken Exhibit A) between the Governor of Maryland, as the receiving State, and the Governor of Maine, as the surrendering State. Paragraph 3 of that agreement provides that Oken will be returned to Maine by the State of Maryland in the event Oken is acquitted of charges there or is found not competent to stand trial, not criminally responsible, is found guilty and receives a sentence of life or a term of less than life or is pardoned or his sentence is commuted to a term of less than life without parole. Paragraph 4 of the agreement provides that if Oken is convicted in Maryland and receives a sentence of death or life

without parole, then he will not be returned to Maine. Oken contends that, whereas the instant action is brought under the Extradition Act, 15 M.R.S.A. [sec.] 201 et seq., of Maine and Article 41 [sec.] 2-205 of the Annotated Code of Maryland, the executive agreement is beyond the limitations of those statutes. That is, 15 M.R.S.A. [sec.] 205 provides:

> When it is desired to have returned to this State a person charged in this State with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the Governor of this State may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this State as soon as the prosecution or imprisonment following conviction in this State is terminated.
>
> The Governor may surrender on demand of the executive authority of any other state any person in this State who is charged in the manner

> provided in section 223 with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily.

That portion of the above paragraph which reads "or imprisonment following conviction" does not appear in the Maryland version. Oken contends the Maryland statute does not contemplate that custody would be retained after imprisonment and, in any event, neither the Maine nor the Maryland Extradition Act intended the imposition of a death sentence as part of prosecution or imprisonment. It is his position that the demanding State (Maryland) has only temporary custody of the prisoner and upon conviction he must be returned to the surrendering State for completion of the sentence in that State. He therefore contends that paragraph 4 of the executive agreement violates the above statute which

conditions the authority to enter into the agreement upon the eventual return of the prisoner. He also contends that the State failed to produce evidence of identification that he is the fugitive named in the executive agreement. He further contends that his guilty plea in York County was entered with the understanding that, upon completion of prosecution and conviction of charges in Maryland, he would be returned to Maine for completion of his sentence.

CONCLUSIONS OF LAW

The State carried its burden on the issue of identification. Oken did not challenge the facts of the documents at the hearing on November 17, 1989. The documents included Maryland police photographs of Oken which identified him as the same person before the court.

The teletype asking that Oken be held for Maryland charges was received by Maine authorities on November 18, 1987. The Act contains no definition of "detainer".

> A detainer for the purposes of the Interstate Agreement on Detainers is notification filed with the institution in which a prisoner is serving a sentence advising that he is wanted to face pending charges in another jurisdiction.

United States v. Mauro, 436 U.S. 340, 359, 98 S.Ct. 2843, 1846 (1978). As previously noted, the State does not concede that Exhibit 3 constitutes a detainer. It does concede that the teletype was received but it does not agree that the word "detainer" used in the teletype triggers or in any way affects the ICD. The purposes of the ICD are stated in 34-A M.R.S.A. [sec.] 9601 which provides in part:

> The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in

> securing speedy trials of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints.

Maine has recognized that the ICD is applicable only to prisoners serving a sentence in prison and its rationale is generally recognized as preventing "obstructions to programs of treatment and rehabilitation of the sentence of prisoners who have entered the life of the institution to which they have been committed for a term of imprisonment." State v. Bellino, 557 A.2d 963, 964 (Me. 1989), quoting Annotation, Validity, Construction, and Application of Interstate Compact on Detainers, 98

A.L.R.3d 160, 187 (1980). An individual who is being held awaiting trial is not a person serving a term of imprisonment within the meaning of the ICD. Commonwealth v. Petrozziello, 491 N.E.2d 627, 631 (Mass. App. 1986). Therefore, it necessarily follows that the word "detainer" used in the teletype of November 18, 1987 could not invoke the provisions of the ICD since Oken was not serving a term of imprisonment in Maine. Since Oken was not detained within the meaning of the ICD, there is no need to address the issue of whether he can be extradited, tried, and upon conviction, sentenced to death without being returned to the sending State for completion of sentence in that state.

Oken was charged with being a fugitive from justice pursuant to 15 M.R.S.A. [sec.] 201 et seq,, the Uniform

Extradition Act. "Fugitive from justice" is defined in [sec.] 201 (4) (A) as:

> Any person accused of a crime in the demanding state who is not in that state, unless he is lawfully absent pursuant to the terms of his bail or other release. This definition shall include both a person who was present in the demanding state at the time of the commission of the alleged crime and thereafter left the demanding state and a person who committed an act in this State or in a 3rd state or elsewhere resulting in or constituting a crime in the demanding state.

In those states where the Uniform Extradition Act has been adopted, the courts of the asylum State are bound by its provisions. A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. "Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in

order; (b) whether the petitioner has been charged with a crime in the demanding State; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive." Michigan v. Doran, 439 U.S. 282, 289, 95 S.Ct. 530 (1978). The record reveals that these four questions must all be answered in the affirmative. The documents on file are valid on their face and there is no legal basis to deny the State the right to surrender Oken to Maryland for prosecution.

Finally, the transcript of the Rule 11 proceeding in York County Superior Court contains nothing which could be construed to mean that the State agreed to Oken's guilty plea with the understanding he would thereby preclude Maryland from imposing and carrying out the death

penalty in the event of his conviction for murder in that State.

For the foregoing reasons, the entry shall be:

Petition for habeas corpus is DENIED.

DATED: January 30, 1990

/s/ Carl O. Bradford
Carl O. Bradford
Justice, Superior Court

State of Maine
Knox, ss.

Superior Court
Criminal Action
Docket No. CR-89-502

STATE OF MAINE,	)	
	)	
Plaintiff	)	RESPONSE TO MOTION
	)	FOR FINDINGS OF
v.	)	FACT AND
	)	CONCLUSIONS OF LAW
STEVEN HOWARD OKEN,	)	
	)	
Defendant	)	

Petitioner has filed a motion for findings of fact and conclusions of law. Rule 88(b) , [sic] M.R.Crim.P., requires the justice who presided in Superior Court to prepare and forward to the Law Court findings of fact. To the extent required by Rule 88(b), the following responses are made:

I. The court found that the teletype containing the word "detainer" was not a detainer within the meaning of the Interstate Compact on Detainers for the reason that a person awaiting trial was

not a prisoner serving a term of imprisonment in Maine. This reasoning applies to the two Exhibits referred to in the memorandum contesting extradition.

II. The Executive Agreement between the governors of Maine and Maryland appears to be valid on its fact [sic] and in full compliance with the Criminal Extradition Act. Such finding is implicit in the Decision and Order of January 30,1990. To the extent that it may be concluded that it was not implicit, then it is hereby found that the Criminal Extradition Act authorizes the execution of the Executive Agreement. The Executive Agreement is not beyond and/or counter to the statutory authority of the Maine and Maryland versions of the Criminal Extradition Act.

III. The Executive Agreement has been found to be valid on its face and in full

compliance with the Criminal Extradition Act. The Petitioner will not be unconstitutionally prejudiced in a sentencing pursuant to a conviction for crimes charged against him in Maryland.

Date: February 6, 1990

/s/ Carl O. Bradford
Carl O. Bradford, Justice
Superior Court

NOW, THEREFORE, it is ORDERED that a certificate of probable cause to proceed with the appeal be and is hereby denied. It is FURTHER ORDERED that a copy of this order, together with the complete record of the proceedings in the Superior Court now on file in this Court, be returned to the clerk of the Superior Court.

DATED: March 6, 1990.

For the Court

/s/
Chief Justice